No. 89-504

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our opening brief, we set forth two approaches to this case, each of which is, in our view, independently sufficient to support jurisdiction of the Secretary's appeal under 28 U.S.C. 1291. Under the narrower approach, whether or not the district court's order was final in the sense of completely terminating all judicial proceedings on the merits, it does come within the special class of cases in which a right of appeal nevertheless has been recognized in furtherance of the practical considerations underlying the finality principle. Gov't Br. 36-45. Second, and more broadly, under the express terms of 42 U.S.C. 405(g)—as well as under general principles of finality and judicial review of agency action developed by this Court—the district court's decision was final in the fullest sense of the jurisdiction granted to appellate courts by 28 U.S.C. 1291. Gov't Br. 12-36.

Neither of these arguments has been refuted by respondent. Indeed, respondent's effort, by brute force, to transpose into the administrative-review context precedents of this Court that cannot sensibly be translated verbatim to that setting ignores the distinct and important question of appealability raised in this case. This question—of how the finality rule applies to the right of an Executive Branch agency to appeal a district court order that both invalidates an administrative decision and remands the matter to the agency for further proceedings under different legal standards—has not been definitively addressed by this Court. But as we have shown (Pet. 23-25; Reply Br. Pet. Stage 8-9; Gov't Br. 28-29 & n.21), the great weight of authority in the lower courts over the past several decades firmly supports the agency's right of appeal in these circumstances—a right that has been recognized in cases arising under the Social Security Act as well as other federal statutes. See generally *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989). And significantly, in the leading lower court case on the subject, *Cohen* v. *Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), this Court granted review and reversed the Fifth Circuit's ruling on the merits, without questioning the Fifth Circuit's holding (and supporting rationale) that it had jurisdiction over the Secretary's appeal. *Richardson* v. *Perales*, 402 U.S. 389 (1971). See Gov't Br. 27-28.[1] Respondent now asks this Court to

[1] Since this Court's jurisdiction depended on the correctness of the Fifth Circuit's ruling, respondent's attempt (Br. 42 n.36) to minimize the significance of *Cohen* v. *Perales* by characterizing the Court's decision as not "reaching" the threshold jurisdictional issue is without merit. Moreover, although respondent also attempts (Br. 42 n.36) to discount *Cohen* v. *Perales* on the ground that the Fifth Circuit there did not have the benefit of the Court's more recent decisions under 28 U.S.C. 1291, those decisions in fact support the correctness of the jurisdictional ruling in *Perales*. See pages 3-12, *infra*.

Respondent's related assertion (Br. 42 n.36) that "*Perales* is questionable even within the Fifth and Eleventh Circuits" is equally without merit. As support for this proposition in the Fifth Circuit, respondent cites *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (en banc), cert. denied, 469 U.S. 818 (1984), but that case involved the distinct question of the finality of an *administrative* decision, and the court there did not even cite, much less overrule, *Perales*. As support for this proposition in the Eleventh Circuit, respondent cites *Taylor* v. *Heckler*, 778 F.2d 674, 677 (1985). Subsequent Eleventh Circuit decisions, however, have recognized the Secretary's right of appeal, despite the inclusion of a remand in the district court's order. See *Pickett* v. *Bowen*, 833 F.2d 288, 290-291 (1987); *Huie* v. *Bowen*, 788 F.2d 698, 701-703 (1986); *North Broward Hosp. Dist.* v. *Bowen*, 808 F.2d 1405, 1408 n.3 (1987), vacated on other grounds, 485 U.S. 1018 (1988). Moreover, in *Taylor* v. *Heckler* itself, the panel unequivocally expressed the view that under the provisions of 42 U.S.C. 405(g) upon which we rely, an order holding the decision of the Secretary unlawful and remanding for a new round of proceedings *is* an appealable final judgment, but the panel felt bound by a prior Eleventh Circuit decision to the contrary that was itself a departure from *Perales*. See 778 F.2d at 676-677.

Finally, respondent fails in her attempt to distinguish *Perales* by relying on the Fifth Circuit's statement there that " 'an order *sua sponte* by the court for the taking of additional evidence' is *not* immediately appealable." Resp. Br. 42 n.36 (quoting 412 F.2d at 48). The remand in this case was *not* an interlocutory remand for the receipt of additional evidence as a prelude to review; rather, the remand followed the district court's review of the Secretary's decision on the merits.

sweep this past practice and precedent aside, and she does so without pointing to any adverse consequences that have resulted to date from recognition of an agency's right of appeal in circumstances such as these.

1. The narrower of the two approaches suggested in our opening brief builds upon *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The question before the Court under that approach is whether the rationale and underlying principles of *Cohen* and its progeny support appealability here, not, as respondent seems to argue (Br. 32-36), whether that result is compelled by mechanical application of the precise terminology used in the very different context of *Cohen* and other cases involving on-going proceedings in a district

court.[2] In our view, the question whether *Cohen* supports appealability here must be answered in the affirmative.

a. Section 28 U.S.C. 1291 grants the courts of appeals jurisdiction of appeals from all "final decisions" of the district courts. Ordinarily, there is no "final decision" until the district court has entered a final judgment in the case—"until there has been a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. 1494, 1497 (1989). As we explain below (see pages 13-20, *infra*), the district court's order in this case was final in this sense because it ended the relevant litigation concerning the validity of the particular agency action before the court on judicial review. But even if we assume, arguendo, that the order was not a final judgment, it nevertheless was a "final decision" for purposes of Section 1291.

As the Court has explained, Section 1291 "[does] not uniformly limit appellate jurisdiction to 'those final judgments which terminate an action.'" *Abney* v. *United States*, 431 U.S. 651, 658 (1977) (quoting *Cohen*, 337 U.S. 545). Rather, "[I]t is a final *decision* that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Abney*, 431 U.S. at 658 (quoting *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring)). See also *Mitchell* v. *Forsyth*, 472 U.S. 511, 524 (1985) ("a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case"). The statutory reference to "final decisions" thus suggests a flexibility that is harder to read into the term "final judgment."[3] And the Court has repeatedly emphasized that the inquiry into finality requires an evaluation of the "competing considerations" underlying questions of appealability. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974); see also *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). *Cohen* and its progeny thus do not represent an "exception" to the general principle of finality under 28 U.S.C. 1291, but rather an application of that principle to a discrete category of cases involving orders entered in the course of on-going proceedings in the district court.[4]

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[2] As the Court explained in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974): "No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

[3] Respondent's reliance (Br. 34 n.28) on *Ex parte Tiffany*, 252 U.S. 32, 36 (1920), for the proposition that the term "final decision" in what is now Section 1291 means the same thing as "final judgment" therefore is inconsistent with the Court's more recent understanding. *Harrington* v. *Haller*, 111 U.S. 796, 797 (1884), also cited by respondent (Br. 34 n.28), involved a different jurisdictional statute governing this Court's jurisdiction to review decisions of a territorial court.

On a similar point, respondent also miscites P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* (3d ed. 1988). That work does *not*, as respondent implies (Br. 34 n.28), argue that "final decision" (in Section 1291) is a more restrictive term than "final judgment" (in 28 U.S.C. 1257). To the contrary, in the discussion cited by respondent, the work simply proposes several possible bases for distinguishing between the sections, several of which—including "[t]he language of the two statutes"—cut in favor of a *broader* reading of Section 1291. P. Bator et al., *supra*, at 1812.

In any event, the term "final judgment" in 28 U.S.C. 1257, which governs this Court's jurisdiction to review the decisions of state courts, also has been given a practical construction. That construction permits review by this Court of a distinct federal issue resolved by a state appellate court in certain circumstances, even where further proceedings, including a trial, remain to be conducted in a lower state court on remand. See generally *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-485 (1975). It is significant that in those cases, as here, there was no interference with on-going proceedings in the court whose decision was deemed "final."

[4] A similar application of, rather than exception to, the finality requirement in Section 1291 is embodied in Fed. R. Civ. P. 54(b). In *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 436-437 (1956),

Of course, *Cohen* does represent an exception to the general rule under Section 1291 that ordinarily there is no "final decision" until the district court has entered a final judgment that terminates the entire litigation. But the Court has not held that orders satisfying the precise terminology used in *Cohen* and its progeny exhaust the category of orders that qualify for appeal prior to entry of a judgment formally terminating the litigation. To the contrary, the Court has held that (quite aside from the "collateral order" doctrine) an order staying proceedings pending resolution of state-court proceedings on the same issue was a "final decision" because, although no final judgment had been entered, the order meant that as a practical matter there would be no further litigation on the issue in the district court. *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 9-10 (1983). See also *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 203 (1848); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307-311 (1962); cf. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467-468 (1978) (because order refusing to certify a class did not terminate the litigation, it could be appealed under Section 1291 only if it came within "an appropriate exception" to the final-judgment rule; respondents relied solely on the "collateral order" exception articulated in *Cohen*).

b. There is no need here, however, for the Court to articulate any new or distinct exception to the final-judgment rule. Taking into account the structurally different character of the present case—the fact that the action alleged to preclude "finality" is the remand to a different Branch—it is clear that the principles underlying *Cohen* and its progeny fully support the Secretary's right of appeal. Those principles, like the

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the Court explained that Rule 54(b) is not in derogation of the finality requirement; rather, it is an authorization to release for appeal "final decisions" on one or more, but less than all, claims in multiple-claim actions.

finality requirement itself, must be given a "practical rather than a technical construction." 337 U.S. at 546. Ultimately, the inquiry must be whether allowing an appeal is consistent with the purposes of the finality requirement, and each prong of the *Cohen* formulation should be interpreted in light of those purposes.[5]

i. The first requirement under the *Cohen* doctrine—that the district court's order "conclusively determine the disputed question," *Coopers & Lybrand*, 437 U.S.

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[5] Respondent's assertion (Br. 33) that the precise articulation of the factors in *Coopers & Lybrand* is "fully applicable in the context of judicial review of administrative agency action"—and requires dismissal of the Secretary's appeal here—is incorrect. Respondent principally relies for this assertion upon *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), but that case involved the completely different issue of the finality of an *administrative* decision.

Ironically, respondent also cites (Br. 33) *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 328-332 (D.C. Cir. 1989), for the same point. In *Occidental Petroleum*, the court of appeals in fact *sustained* the agency's right of appeal, despite the inclusion of a remand in the district court's order, and it specifically recognized the need for a practical application of the *Cohen* factors in that setting. 873 F.2d at 330-331. The court observed: "At least in the present context, the distinction between a final order and an interlocutory order that is nonetheless appealable under the collateral order doctrine is, as a practical matter, purely terminological." *Id.* at 331.

Finally, respondent errs in citing (Br. 33) *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980) (Br. 33) in support of her argument that the Secretary could not appeal in this case under the principles of *Cohen*. The Court in *Seatrain* did not reach the question whether the district court's order was final in all respects, because it found that the district court had properly exercised its authority to release for appeal a "final decision" relating to one aspect of the case. See note 4, *supra*. The sentence quoted by respondent (444 U.S. at 583 n.21) emphasizes the finality of the decision being appealed, even assuming (though the Court clearly did not decide, see *id.* at 581 n.17) that the disposition of the case as a whole was not "final" for purposes of 28 U.S.C. 1291. Moreover, in *Seatrain*, the appeal in question was not taken by the agency (as in this case), but by the private party who had successfully urged the district court to set aside the agency action.

at 468—is clearly satisfied. Respondent reduces her answer on this point to a footnote, observing (Br. 40-41 n.33) that "there is nothing to prevent the district court from reconsidering its prior decision following a return to the district court by either party." This aspect of the *Cohen* test, however, was intended to exclude orders that are "inherently tentative," such as the order denying class certification in *Coopers & Lybrand*. See *Moses H. Cone*, 460 U.S. at 12 n.14 (quoting 437 U.S. at 469 n.11). Accord *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277-278 (1988); see also *Cohen*, 337 U.S. at 546 (statute "disallow[s] appeal from any decision which is tentative, informal or incomplete"). Contrary to respondent's contention, the mere possibility, which is present in virtually every case, that a prior ruling might be altered for cause shown prior to entry of a final judgment does not render all such orders " 'inherently tentative' in the sense of that phrase in *Coopers & Lybrand*." *Moses H. Cone*, 460 U.S. at 12-13 n.14. It is therefore sufficient here that the district court's ruling regarding the legal insufficiency of the Secretary's reliance on the Listing was made "with the expectation that [it] will be the final word on the subject addressed." *Ibid.*

ii. With respect to the second factor articulated in *Cohen* and related cases, the point, as emphasized in our opening brief (Gov't Br. 40-41), is that the issue on appeal is functionally separate from the rest of the case in two critical respects. First, because the cause is no longer before the district court, but rather has been remanded in its entirety to the Secretary, there can be *no* disruption of an ongoing trial process in the district court—a principal danger that underlies this aspect of the *Cohen* limitation of appellate jurisdiction. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988) (inquiring whether appeal will be "disruptive of ongoing proceedings"); *Moses H. Cone*, 460 U.S. at 31 (Rehnquist, J., dissenting) (Section 1291 "is a congressional command to the federal courts of appeals not to interfere with the district courts' management of ongoing proceedings").[6]

Second, since the agency on remand is governed by the district court's ruling on the matter sought to be appealed in this case, that matter cannot be reconsidered by the agency or affected by its new decision. Nor will it be an issue in the district court if and when a later action for review is brought by the claimant, except in the sense that any court has the *power* to reverse itself on an earlier ruling in the same proceeding—a bare possibility that, as we have already shown (see page 8, *supra*), is insufficient to preclude appealability. See *Abney*, 431 U.S. at 660 (quoting *Cohen*, 337 U.S. at 546 (matter appealed "will not 'affect, or . . . be affected by,' subsequent proceedings in district court)). Nor, contrary to respondent's contention (Br. 43-44), does the existence of some factual overlap between the issue being appealed and the proceedings on remand foreclose the Secretary's right of appeal. See *Mitchell* v. *Forsyth*, 472 U.S. at 528-529 & n.10.[7]

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[6] The Court has observed that the second requirement under the *Cohen* formulation—the separability of the issue to be appealed—is "[c]losely related to the 'threshold requirement of a fully consummated decision.' " *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978). Because a district court order holding the Secretary's decision unlawful and remanding for further proceedings under different legal standards constitutes a final rejection of the particular decision of the Secretary that is before the court, an appeal by the Secretary is *not* "likely to eliminate a trial judge's opportunity for reconsideration." *Budinich*, 486 U.S. at 202.

[7] Respondent also argues (Br. 41-43) that an appeal should not be allowed because the district court did not resolve an "important issue." Yet it is hard to see how a decision effectively invalidating a policy of the Secretary embodied in formal regulations can be regarded as anything less. Respondent disputes (Br. 41 n.34) that the district court's order had that effect. But the district court *affirmed* the Secretary's finding that respondent did not establish that she had an impairment that met or equalled a listed impairment. Pet. App. 15a-16a. If the district court had respected the

iii. With respect to the third factor—the "effective unreviewability" of the ruling at a later stage—we strongly disagree with both of respondent's arguments. The fact that the claimant may return to the district court if she *loses* in the rehearing at the administrative level (see Resp. Br. 37-38) is and should be analytically irrelevant. The notion of reviewability as developed in *Cohen* and its progeny is one that turns on whether the decision now being appealed will be subject to later review if the other party to the litigation ultimately *prevails*. After all, reviewability (in the court of appeals) if the claimant loses at the administrative level depends entirely on facts beyond the Secretary's control—whether the claimant seeks judicial review of the Secretary's new decision and whether, if she does, she prevails in the district court.

Respondent argues in the alternative (Br. 38-40) that the district court's decision at this stage will be review-

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statutory text (42 U.S.C. 423(d)(2)(B) (1982 & Supp. V 1987)) and the Secretary's implementing regulations, that finding would have compelled affirmance of the Secretary's decision denying respondent's claim. See Gov't Br. 5 n.7. The district court's insistence on a distinct, individualized assessment of residual functional capacity therefore effectively invalidated the statutory and regulatory limitation on eligibility. Compare *Heckler* v. *Campbell*, 461 U.S. 458, 465-466 (1983) (lower court's requirement that additional evidence be introduced on particular types of jobs available for claimant implicitly calls into question validity of medical-vocational guidelines that dictate answer to that question).

Despite respondent's protestations (Resp. Br. 41, 48), the fact that the same question may arise in some other case that may reach a court of appeals is irrelevant both to the issue of the importance of the district court's determination and to the issue, discussed below, of the effective unreviewability of that determination. That the question may arise in another case is a fortuity that has never entered into the calculus and should not. And indeed the matter of appealability in dispute here is at least as likely to arise in the context of district court review of administrative regulations that would not be subject to review in any other forum or any other case. Compare Gov't Br. 39 n.30.

able if the claimant prevails before the Secretary because the Secretary may file the decision in district court for purposes of determining attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. This is an argument we think the Court can accept only by severely straining statutory provisions governing judicial review that were enacted long before the EAJA. Although we agree that it is appropriate for the Secretary to notify the district court of a decision in the claimant's favor on remand so that EAJA fees may be awarded, the limited, essentially ministerial purpose of that notification does not extend to a review of the merits, either in the district court or the court of appeals. See point 2(b), *infra*.[8] Indeed, if it did, what would prevent the Secretary from disagreeing with the judgment of his own Appeals Council and asking the district court not to affirm (as respondent apparently believes the Secretary must do) but to reverse, because the Appeals Council made an error on remand? The Secretary has no such authority as a general matter (see

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[8] All but one of the cases cited by respondent (Br. 23-24, 39 n.31) that refer to the Secretary's filing with the court any decision on remand that is favorable to the claimant were concerned only with providing a realistic mechanism for the award of attorney's fees at that point. In each of those cases, the claimant was not yet a "prevailing party" within the meaning of the EAJA at the time of the court's order setting aside the Secretary's first decision (which denied benefits) and remanding for further proceedings. See *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2255 (1989); pages 17-18, *infra*. None of the cases suggested that the court would take any further action on the merits beyond the essentially ministerial act of entering an order on the basis of the Secretary's filing in order to trigger the court's authority to award attorney's fees under the EAJA. In the remaining case, *Wilson* v. *Heckler*, 609 F. Supp. 120 (W.D. Mo. 1985), the court expressly stated that the sixth sentence of 42 U.S.C. 405(g) requires a subsequent filing in court *only* where the court has provided for reopening of the administrative proceedings "*before* making any decision on the merits." 609 F. Supp. at 122.

Gov't Br. 42 & n.33), and he does not seek it here.[9] But we do not see how it can be denied if the district court's jurisdiction is as expansive as respondent now argues.

2. a. Our broader submission in this case is that the district court's order was "final," in the fullest sense of that term, because it constituted a final rejection of the particular administrative decision before the court on judicial review and therefore ended the relevant litigation on the merits. The finality of the court's order in this regard is not destroyed by the fact that the court, as relief, then remanded the cause to the Secretary for a fresh round of administrative proceedings and the rendering of a new decision. To the contrary, the remand underscores the finality of the judicial order because it removed all matters concerning respondent's claim for benefits from the court and returned them to the official of another Branch who is responsible for administering the Social Security Act.

In a case such as this, the district court's mandate is fully satisfied, and the claimant receives all the relief to which she is entitled under the court's order, when the Secretary completes the rehearing pursuant to the remand and renders a new decision on the claim for benefits. The possibility of subsequent proceedings for judicial review on the distinct question of the validity of the Secretary's second decision therefore does not detract from the finality, for purposes of 28 U.S.C. 1291, of the court's order holding the Secretary's first decision unlawful.

As explained in our opening brief (Gov't Br. 30-36), this conclusion is supported by general principles governing judicial review of agency action under the Administrative Procedure Act, as well as principles of finality under 28 U.S.C. 1291 and similar statutes.[10] We

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[9] Respondent errs in relying (Br. 23-24, 38-39) on the sixth sentence of 42 U.S.C. 405(g) as requiring the Secretary to file the new decision on remand with the court in a case such as this. As we have explained (Gov't Br. 21-24), the sixth sentence (including the filing requirement) applies only to a special category of remands initiated by the Secretary or ordered by the court for the receipt of newly discovered evidence. But even if the sixth sentence requirement extended to the present situation, it would not follow that the Secretary would thereby be authorized to challenge the decision of his own Appeals Council awarding benefits. The Secretary lacks a right to judicial review even where he believes that the Appeals Council has committed an error of law. We see no statutory basis for an exception to this preclusion where the Appeals Council's legal error was dictated by a judicial order in proceedings for judicial review of the Secretary's original decision. To the contrary, the seventh sentence of 42 U.S.C. 405(g), which respondent properly insists (Br. 38-39) must be read in tandem with the filing requirement in the sixth sentence, provides that the new findings and decision filed with the court after a remand "shall be reviewable only to the extent provided for review of the original findings of fact and decision."

If the Secretary cannot challenge the decision of his own Appeals Council in the district court, it would seem to follow that he cannot appeal a district court order affirming the Appeals Council's decision. Thus, the Secretary's ministerial district court filing, for purposes of the EAJA, of a remand decision favorable to the claimant does not furnish a suitable procedure for the Secretary to challenge the district court's prior legal ruling in the court of appeals.

[10] We have cited in our opening brief (Gov't Br. 29-30) several of this Court's decisions in cases arising under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2350, which (in Section 2350) limits this Court's review to orders granting or denying interlocutory injunctions and to "final" judgments. (Just last month, this Court granted certiorari in two other such cases in which the court of appeals remanded to the agency, and no jurisdictional question was raised in the petitions or responses or suggested by the Court. See *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, No. 89-1027 (Mar. 26, 1990); *CSX Transportation, Inc.* v. *Brotherhood of Railway Carmen*, No. 89-1028 (Mar. 26, 1990).)

The purpose of those citations was not to show that the precise jurisdictional issue raised here has already been addressed and resolved by the Court, but rather to indicate that in a closely analogous context, the litigants and this Court have—quite properly in our view—assumed the existence of jurisdiction. Respondent, however, argues that the cases are not in point because this Court is not limited by the "final judgment" language in Section 2350: in respondent's view (Br. 33-34 n.28), the Court also has jurisdiction

further explained (Gov't Br. 15-21, 27) that those general principles are given expression in the precise context of this case in the statutory provision governing judicial review of agency action under the Social Security Act, 42 U.S.C. 405(g). The fourth and eighth sentences of Section 405(g) expressly contemplate (i) that a judicial order affirming, modifying, or reversing the Secretary's decision is a "final" "judgment," whether or not the court "remand[s] the cause for a rehearing" by the Secretary, and (ii) that any such judgment (*i.e.*, whether "with or without" a remand) "shall be subject to review in the same manner as a judgment in other civil actions."[11] Contrary to respondent's assertion (Br. 13 & n.9, 16), this is not a novel interpretation of 42 U.S.C. 405(g). It was relied upon by the Fifth Circuit in its leading decision rendered more than 20 years ago,

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under 28 U.S.C. 1254(1) to grant certiorari in such cases in the absence of a final judgment. That cannot be. The Hobbs Act makes the courts of appeals the point of entry into the federal judicial system in cases subject to its terms, and Section 2350 is plainly designed to put this Court, as the first reviewing court, in the same relation to the courts of appeals that those courts normally bear to the district courts. Thus, the specific provisions of Section 2350 must prevail over the more general provisions of Section 1254.

[11] In her only effort to grapple with the controlling statutory text, respondent views (Br. 25) the quoted language as merely suggesting that, in determining the appealability of district court orders entered under 42 U.S.C. 405(g), appellate courts should look to the appropriate jurisprudence under Section 1291. But that is not what the fourth and eighth sentences say. They provide that an order such as that at issue here is both a "judgment" and "final" —terms strongly indicative of appealability—and that the judgment "shall be subject to review" in the same "manner" (*i.e.*, subject to the same procedures) as the judgment in other civil actions. There is no suggestion that the judgment, deemed final, might not be subject to appeal at all. Respondent's extended discussion (Br. 20-23) of the *source* of the district court's remand authority—*i.e.*, whether it is conferred by Section 405(g) or an inherent equitable power—is irrelevant to the question whether a remand precludes an appeal of an otherwise appealable order.

Cohen v. *Perales*, 412 F.2d at 48. See also *Taylor* v. *Heckler*, 778 F.2d 674, 676-677 (11th Cir. 1985).[12]

b. In her effort to reply to our argument, respondent wholly misconceives it. She states (Br. 13-15) that we are claiming a right to appeal from a "fourth sentence" remand order, although we concede that there can be no appeal from a "sixth sentence" remand order under 42 U.S.C. 405(g). Thus, she concludes (Br. 30-31), we are asking courts to enter an intricate thicket of distinguishing among remand orders, a task whose difficulty, in her view, is demonstrated by our disagreement about what type of remand order is involved here.

Respondent is correct that we disagree about whether the remand in this case was issued under the sixth sentence of Section 405(g); we think it clear that it was not.[13] But that disagreement is irrelevant to our argument. The point remains that we are appealing *not* from the remand itself, but from the district court's antecedent decision—unquestionably made under the authority granted by the fourth sentence of Section 405(g)

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[12] To be sure, most decisions sustaining the Secretary's right of appeal in circumstances such as these have relied on the rationale of *Cohen* v. *Beneficial Industrial Loan Corp.*, which also was relied upon in *Perales*, 412 F.2d at 48.

[13] Respondent's contention (Br. 28-29) that the district court's remand in this case was governed by the sixth sentence of 42 U.S.C. 405(g), and for this reason could not be appealed by the Secretary even under our theory, is wholly without merit. The case was not remanded for the receipt of "new" and "material" evidence to facilitate the court's own review of the Secretary's decision; it was remanded only after, and as a consequence of, such review by the court, which found the Secretary's decision unlawful because of its reliance on the Listing of Impairments. As explained in our opening brief (Gov't Br. 23-24), the courts of appeals have uniformly recognized that such a remand is *not* governed by the sixth sentence of Section 405(g). Contrary to respondent's suggestion (Br. 28, 29), the fact that the district court's order contains the phrase "for good cause shown"—a phrase also contained in the sixth sentence of Section 405(g)—does not alter the fundamental character of the order.

—reversing the Secretary for an error of law in his reliance on the Listing of Impairments in the governing regulations. That is the decision we contend is made "final" both by the explicit terms of Section 405(g) and by general principles of finality. And since the respondent's action for judicial review has been effectively terminated for present purposes (though not for purposes of an award of attorney's fees) by the remand, an appeal properly lies. Because the remand itself is not the subject of the Secretary's appeal in a case such as this, there is no need to distinguish between different types of remands as a precondition to entertaining his appeal.

The point, we believe, is well illustrated by the closely analogous ruling of this Court in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). In that case, a third party who had been impleaded in a state court removed the action to a federal court; the federal court in "a single decree" (*id.* at 142) dismissed the action against the third party and, there being no remaining diversity of citizenship, remanded the case to the state court. One of the defendants then sought to appeal "not from the order of remand, but from that dismissing its action against [the third party]." *Ibid.* Although recognizing that then (as now, see 28 U.S.C. 1447(d)) no appeal lay from an order of remand, this Court upheld the defendant's right to appeal the dismissal of its action against the third-party defendant. If the appeal was sustained, even though it might not affect the order of remand, it would restore the third-party defendant to the action. So here, if the appeal is sustained, it will restore the decision of the Secretary and the regulatory policy that was effectively invalidated by the district court. Accord, *Mitchell* v. *Carlson*, No. 89-1377 (5th Cir. Mar. 15, 1990), slip op. 2659-2663.[14]

[14] Because the subject of the Secretary's appeal was not the remand itself, but the district court's overturning of the Secretary's decision (and the legal ruling on which it was based), the Secretary's right of appeal is fully consistent with the general rule, cited by respondent, that "a [district court's] remand order [to any administrative agency] is 'interlocutory' rather than 'final,' and thus may not be appealed immediately" under 28 U.S.C. 1291. See Resp. Br. 12-13 (quoting *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d at 329). In fact, *Occidental Petroleum* sustained the agency's right of appeal where, as here, the district court's order resolved a legal issue on which effective appellate review might be foreclosed at a later date.

The fact that the Secretary's appeal is from the district court's ruling on the merits (not the resulting remand) also serves to distinguish this case from those in which the courts have not permitted a claimant to appeal a pure remand order. Thus, the result we believe Section 405(g) requires would not impose a burden on the courts of appeals of entertaining appeals by claimants who challenge the court's separate decision to remand for further proceedings.

c. Respondent's reliance (Br. 14, 17-20, 35) on the decision last Term in *Sullivan* v. *Hudson*, 109 S. Ct. 2248 (1989), is misplaced. The issue the government argued and lost in *Hudson* is whether attorney's fees may be awarded under the EAJA (28 U.S.C. 2412) for services rendered in proceedings before the agency on remand—an issue that is quite distinct from the question of appellate jurisdiction under a statute enacted long before the EAJA. Under the EAJA, no fees can be awarded for work done at any level (administrative or judicial) until it is determined whether the claimant is a "prevailing party" on his or her underlying claim for benefits. *Sullivan* v. *Hudson*, 109 S. Ct. at 2255. When a court sets aside the Secretary's initial decision denying benefits and remands the entire cause to the Secretary, that determination must await the outcome of the rehearing on remand and any further action for judicial review. To accommodate this feature of the EAJA, it is appropriate for the record on remand to be filed with the court if the claimant has prevailed, so that a fee determination may be made. Thus, as the Court noted in *Hudson*, "for purposes of the EAJA," finality must await the outcome of proceedings on remand. 109 S. Ct.

at 2255.[15] But the proposition that the absence of finality with respect to attorney's fees does not affect finality for purposes of appeal is one well recognized by this Court. See *Budinich* v. *Becton Dickinson & Co.*, *supra*. Thus, respondent is in error in suggesting that the decision in *Hudson* somehow resolves the issue here.[16]

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[15] The passage in the House Report on the 1985 amendments to the EAJA quoted by respondent (Br. 18 n.13, 27) has no bearing on the proper interpretation of 28 U.S.C. 1291 and 42 U.S.C. 405(g), which were enacted many years earlier. In any event, that passage was part of a discussion about the practical application of the EAJA in the particular context of remand orders that do not in themselves render a claimant a "prevailing party" on his underlying benefits claim; it did not express any view on the appealability question. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 19-20 (1985).

[16] Respondent contends that we made a crucial concession in *Hudson* that a remand order from a district court to the agency is not a final determination of the civil action and that the district court "retains jurisdiction to review any determination rendered on remand." Resp. Br. 14, 19, quoting *Hudson*, 109 S. Ct. at 2255 (quoting *Hudson* Pet. Br. at 16-17). The single sentence in our opening brief in *Hudson* (at 16-17) upon which respondent apparently relies stated: "Respondent asserts that since the reviewing court retains jurisdiction to review any decision rendered on remand [footnote quoting sixth sentence of Section 405(g) omitted], the remand order does not terminate the judicial action, and the proceedings on remand must therefore be treated as part of the civil action for purposes of EAJA." This sentence essentially recited the respondent's position as articulated in her brief in opposition; it did not concede that a remand does not terminate the judicial action, and it did not purport to be a definitive of explication 42 U.S.C. 405(g) in all respects, especially as regards appealability under 28 U.S.C. 1291, which was not mentioned.

Any doubt on this score is dispelled by our reply brief on the merits in *Hudson* (at 14-17). There, we answered at length the respondent's reliance on the sixth sentence of Section 405(g). We argued (Reply Br. 16), citing *Cohen* v. *Perales*, *supra*, that an order modifying or reversing the Secretary's decision on the merits and remanding for a rehearing under different legal standards "is a 'final judgment' that effectively terminates the proceedings for judicial review of the particular decision of the Secretary that was modified or reversed." Moreover, in both our opening brief (at 17)

d. In sum, the action brought by respondent for judicial review of the Secretary's decision has come to an end, except with respect to the question of attorney's fees. As in the *Waco* case, we do not seek to appeal the order of remand itself, but we do claim a right to appeal the district court's final ruling on an issue of law. If the Secretary's position on that issue is correct, the district court was required to affirm his decision and the court of appeals will be required to reinstate that decision. If, on the other hand, the Secretary's position is held by the court of appeals to be incorrect, there will be a distinct advantage to claimants generally as a result of the prompt appellate holding to that effect. Under the Secretary's announced policy concerning acquiescence in the adverse rulings of a circuit court of appeals within that circuit, the Secretary will either seek further review of the court of appeals' ruling or will promptly publish his acquiescence in it. See 55 Fed. Reg. 1012 (Jan. 11, 1990). But until and unless such a definitive ruling by the court of appeals is obtained, no acquiescence can be forthcoming with respect to an issue on which district court holdings (and even the holdings of other circuits) conflict with the Secretary's view.[17] Such

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and reply brief (at 15), we urged that whether or not the particular district court decision was "final," attorney's fees should not be awarded for work done at the administrative level. We of course do not challenge the Court's contrary holding in *Hudson* regarding the availabiilty of attorney's fees, but the Secretary cannot fairly be taken to have made any concessions there that undermine his right of appeal here.

[17] Respondent suggests (Br. 35-36 n.29) that we are relying on Section 1292(a)(1) as an independent basis of jurisdiction. Although such reliance was indicated in our certiorari petition (Pet. 18-19), we did not press it in our opening brief. Rather, we sought (Gov't Br. 33-34 n.27) to support our finality argument by showing that, in the absence of specific statutory review provisions, an action such as this would have been brought as an independent action for mandamus or an injunction, and the court's order setting aside the agency's decision and ordering the Executive Branch official to

a ruling by the court of appeals will also serve the public interest by relieving the district courts in the circuit of the burden of further litigation on the legal issue. Moreover, in many instances involving an important administrative policy, allowing an appeal from a district court ruling that the policy is invalid will eliminate the widespread uncertainty created by the district court's opinion.

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For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

KENNETH W. STARR
Solicitor General

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conduct a new round of administrative proceedings would unquestionably have been subject to an immediate appeal.

Contrary to respondent's suggestion (Br. 48-50), the availability of interlocutory appeals under 28 U.S.C. 1292(b) should not affect a determination of appealability as of right either in theory or in practice. To do so would be to hold that an appeal that Congress has authorized as of right would be replaced by an appeal that is wholly within the unreviewable and absolute discretion of both the district and appellate courts.

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